

FOREST SERVICE  
U.S. DEPARTMENT OF AGRICULTURE  
(HEIRS OF FRANK M. WILLIAMS)

IBLA 93-263

Decided December 4, 1997

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, confirming reinstatement of and approving Native allotment application AA-7912.

Set aside; case remanded.

1. Alaska: Native Allotments

The heirs of an Alaskan Native are not barred from obtaining an allotment under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), in a forest reservation created prior to that Act, when it can be established that the applicant initiated his qualifying use and occupancy prior to the reservation's creation and completed his 5 years of use and occupancy subsequent to such creation.

2. Alaska: Native Allotments

The Board will order the initiation of a Government contest where there is a substantial factual question as to whether, in accordance with the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), and its implementing regulations, a Native allotment applicant initiated qualifying use and occupancy of his claimed land prior to inclusion of the land in a forest reserve.

APPEARANCES: James J. Ustasiewski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the Forest Service; Mary Anne Kenworthy, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for the Heirs of Frank M. Williams; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE KELLY

The Forest Service (FS), U.S. Department of Agriculture, has appealed from a January 29, 1993, Decision of the Alaska State Office, Bureau of Land Management (BLM), confirming its September 5, 1980, reinstatement of the Native allotment application of the heirs of Frank M. Williams, AA-7912, and approving the application.

Williams' Native allotment application was originally filed, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), for 160 acres of unsurveyed land, situated in protracted sec. 16, T. 79 S., R. 88 E., Copper River Meridian, Alaska, surrounding the head of Kegan Cove off the Moira Sound on Prince of Wales Island, within the Tongass National Forest.

Williams, who was born on February 3, 1890, claimed that his family had long used and occupied the land and that he had personally initiated use and occupancy of it "around 1900 or 1902," when he was a minor child of 10 or 12 years of age. (Handwritten notes attached to application, dated Dec. 9, 1971, at 2.) Williams further claimed that he had engaged in subsistence trapping, hunting, fishing, and berrypicking, initially from January to February, May to July, and September to December of each year (1900 or 1902 through 1923), and that the land was the situs of a garden created by his mother in 1902, as well as a log cabin, which had been built by his father (George C. Williams) in 1880, and a smokehouse, which he had constructed in 1950. Finally, he stated that he had stopped using or occupying the land in 1959, when he was 69 years of age.

The land claimed by Williams had been reserved on August 20, 1902, from entry under the public land laws by Proclamation No. 37 of the President, which created "The Alexander Archipelago Forest Reserve." 32 Stat. 2025 (1902). The Proclamation provided that it should not be construed "to deprive any person of any valid right \* \* \* acquired under any act of Congress relating to the Territory of Alaska." Id. (emphasis added).

Williams' claim was first examined by John N. Patterson, an FS officer, on August 22, 1973. Patterson concluded that Williams might periodically use and occupy the land. (Field Report, dated Sept. 13, 1973 (Ex. B attached to Statement of Reasons for Appeal (SOR)), at 1.)

By Decision dated May 5, 1975, BLM originally rejected Williams' application because, since he was "only 12 years old at the time of the [1902 forest reservation]," he was deemed to have been using and occupying the land as a minor child in the company of his parents and not as an independent citizen acting on his own behalf. (Decision at 1.) Williams appealed to the Board, which docketed the case as IBLA 75-576.

On June 16, 1975, we affirmed the May 1975 BLM Decision in Louis P. Simpson, 20 IBLA 387 (1975), holding that the assertion that Williams

commenced use and occupancy in his individual and exclusive capacity prior to withdrawal was "patently unacceptable." *Id.* at 392. We later reconsidered at what age a Native might initiate qualifying use and occupancy. On June 28, 1979, we held in Floyd L. Anderson, Sr., 41 IBLA 280, 283, 86 Interior Dec. 345, 347 (1979), that an applicant was too young "as a matter of law" to have initiated qualifying use and occupancy when he was 5 years old at the time of withdrawal. However, we held on April 8, 1980, in William Bouwens, 46 IBLA 366, 368-70 (1980), that the initiation of prior qualifying use and occupancy presents a question of fact when the applicant was 8 years of age or older at the time of withdrawal and also asserts that he had engaged in independent use and occupancy.

Williams died on June 29, 1979. On September 5, 1980, BLM reinstated Williams' application so that it might adjudicate, under Bouwens, whether Williams had, despite his age, initiated qualifying use and occupancy of the land before the 1902 forest reservation and otherwise qualified for an allotment. See Forest Service (Heirs of Archie Lawrence), 128 IBLA 393, 396 (1994); letter to FS from BLM, dated July 21, 1992.

On September 8, 1991, Robert P. Rinehart, a BLM realty specialist, talked to Williams' wife and daughter, and accompanied by Terry Gardiner, a fishing partner of Williams who represented the heirs, and Cheri Vavalis, a realty specialist with the Tlingit and Haida Indian Tribes, examined his claim. Based largely on the credibility of Williams' wife regarding his claimed use and occupancy, the presence of berries and fish which could have supported that use and occupancy, independent corroboration of improvements, Williams' apparent use "on his own" prior to reservation, and the absence of any contrary evidence, Rinehart concluded that the "information found supports Mr. Williams' claim to this parcel." (Land Report at 4.)

In its January 1993 Decision, BLM concluded that Williams had initiated qualifying use and occupancy prior to the 1902 forest reservation, that such use and occupancy continued for more than 5 years, and that, upon the filing of his allotment application, he had acquired a vested preference right that related back to the date of initiation of his use and occupancy. Thus, BLM held that Williams' heirs were entitled to a Native allotment of the 160-acre parcel of land. The FS appealed from BLM's January 1993 Decision.

While FS's appeal was pending before the Board, BLM filed a motion to vacate its January 1993 Decision and to close Williams' case file on the basis that the validity of his allotment claim had already been decided with finality by virtue of his participation as a class member in an action that was resolved against all the class members and in favor of the United States by the district court in Shields v. United States, 504 F. Supp. 1216 (D. Alaska 1981), *aff'd*, 698 F.2d 987 (9th Cir.), *cert. denied*, 464 U.S. 816 (1983). In Eva Wilson Davis, 136 IBLA 258 (1996), we denied BLM's motion, concluding that the courts in Shields did not address the specific question of whether Williams had initiated personal use and occupancy prior to the reservation or whether BLM had properly rejected his application in

its May 5, 1975, Decision. Id. at 263. Thus, we held that Williams was not foreclosed by the doctrine of res judicata from establishing that his personal use and occupancy predated the August 20, 1902, forest reservation. Id. at 264-65.

The FS contends first that the 1902 forest reservation precluded Williams from obtaining an allotment since he has failed to demonstrate that he had any rights against the United States that predated the reservation. It argues that Williams did not have any such rights under the Treaty of Cession (Treaties of Mar. 6, 1867, 15 Stat. 359) or the Alaska Organic Act (section 8 of the Act of May 17, 1884, ch. 53, 23 Stat. 24, 26) which were in effect prior to the reservation. Absent such right, FS argues that an Alaska Native could establish no right to ownership of the land before passage of the Native Allotment Act on May 17, 1906. The FS also argues that the preference right to an allotment "vests" only when the Native completes 5 years of use and occupancy and files his application.

[1] It is now well established that, prior to enactment of the 1906 Act, Alaskan Natives could acquire, by virtue of notorious, exclusive, and continuous use and occupancy (which is also required by the 1906 Act), possessory rights to the land, which rights were protected against third parties by the 1884 Act. United States v. Flynn, 53 IBLA 208, 225, 227, 234, 88 Interior Dec. 373, 382, 383, 387 (1981). Further, while a Native was not accorded any rights against the United States, he could, by virtue of such possession, acquire rights which would be recognized and preserved by the United States as valid existing rights when it subsequently reserved or withdrew the land. United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1030 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980). That is what occurred when the President issued his 1902 Proclamation, subject to "valid right[s]." 32 Stat. 2025 (1902).

Moreover, in Forest Service (Heirs of Frank Kitka), 133 IBLA 219, 222 (1995), we specifically held, in identical circumstances, that the "[i]nclusion of the land within the [Alexander Archipelago Forest Reserve and later the Tongass] [N]ational [F]orest does not preclude Kitka's heirs from obtaining his allotment if his use and occupancy preceded establishment of the forest." We reasoned that the authority of the Secretary of the Interior to allot land in a national forest on the basis of qualifying use and occupancy predating establishment of the forest, as specifically provided by section 2 of the 1906 Act, as amended, 43 U.S.C. § 270-2 (1970), applies not only to possessory rights initiated after passage of the 1906 Act, but also those initiated prior to passage of the 1906 Act and then protected by the Organic Act. See Forest Service (Heirs of Frank Kitka), 133 IBLA at 222-23. Our holding in Kitka is applicable here.

Therefore, if Williams initiated qualifying use and occupancy of the subject land prior to establishment of the 1902 forest reservation, we hold that he acquired a possessory right to the land under the Alaska Organic Act, which was preserved as a "valid right" by the President's 1902 Proclamation. 32 Stat. 2025 (1902). Also, assuming he continued to engage in

such use and occupancy, as he alleges, his possessory rights, protected by the 1884 Act prior to the reservation, became an inchoate preference right under the 1906 Act. See Forest Service (Heirs of Frank Kitka), 133 IBLA at 222-23. That Act specifically accorded to a qualified Native, upon the date of its enactment on May 17, 1906, a preference right "to secure by allotment the nonmineral land occupied by him," which thus attached to land actually occupied by him, whether occupancy was initiated before or after that date. 34 Stat. 197 (1906) (emphasis added). Further, upon the completion of 5 years of qualifying use and occupancy and the filing of an application, Williams' preference right would have vested and would have related back to the date of initiation of use and occupancy before the 1902 reservation. Golden Valley Electric Association (On Reconsideration), 98 IBLA 203, 205 (1987); United States v. Flynn, 53 IBLA at 234, 88 Interior Dec. at 387.

We also reject FS's suggestion that Williams did not have an inchoate preference right at the time of the 1902 forest reservation since he was not 21 years of age or the head of a family at that time, as required by section 1 of the 1906 Act, as amended, 43 U.S.C. § 270-1 (1970). See SOR at 7, 15-16. Section 1 of the 1906 Act makes "allot[ment] [of] not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska \* \* \* to any Indian, Aleut, or Eskimo" contingent on being 21 years of age or the head of a family. 43 U.S.C. § 270-1 (1970) (emphasis added). Thus, it is only required that Williams or his heirs satisfy this condition at the time of allotment. United States v. Akootchook, 123 IBLA 6, 10 n.7 (1992).

The FS also argues that, even assuming that he had, by virtue of qualifying use and occupancy, acquired a possessory, and then a preference, right to the land which survived the 1902 forest reservation, Williams then lost that right by abandoning his claim in 1959.

We have long held that an Alaskan Native may, prior to the filing of his allotment application, lose his inchoate preference right to the land where, even though he may not have permanently intended to abandon his claim, he ceased use and occupancy "for a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land." United States v. Flynn, 53 IBLA at 238, 88 Interior Dec. at 389. Such cessation will have the effect of "terminat[ing] all protected rights under both the allotment and permissive occupancy statutes and restor[ing] the land to its original status of vacant and unappropriated land." Id. at 238, 88 Interior Dec. at 389-90. Thus, the land is subject to the initiation of rights by other individuals. Id. at 238, 88 Interior Dec. at 390.

Here, the evidence establishes that Williams initially left the land in 1959. (Handwritten notes attached to application at 1 ("1959 was last time there"); SEACAP questionnaire at 2.) However, there is also evidence that he or, at least, members of his family returned to it, from time to time, even after that date. (Field Report at 1 ("Applicant may use the

area periodically for camping, hunting, fishing, trapping or gathering Forest products"); statement of witness (Frances E. Hamilton), dated Feb. 24, 1975, at 2; statement of witness (Eleanor G. Allen), dated Feb. 24, 1975, at 2.)

In these circumstances, we conclude that the preponderance of the evidence supports the conclusion that Williams did not cease his use and occupancy "for a period of time sufficient to remove any evidence of [his] present use, occupancy or claim to the land," thus abandoning his claim, prior to filing his application in December 1971. See United States v. Flynn, 53 IBLA at 238, 88 Interior Dec. at 389.

Finally, FS contends that Williams acquired no possessory rights in the land claimed because he was not engaged in independent use and occupancy of the land to the potential exclusion of others.

[2] Section 3 of the 1906 Act, as amended, 43 U.S.C. § 270-3 (1970), requires that, in order to qualify for an allotment of land, a Native applicant must submit satisfactory proof that he has engaged in "substantially continuous use and occupancy of the land for a period of five years." Regulation 43 C.F.R. § 2561.0-5(a) states that such use and occupancy

contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

The principal question presented by this case is whether Williams used and occupied the subject land as an independent citizen acting on his own behalf or as a minor child in the company and under the supervision of his parents, prior to the 1902 forest reservation. In the former case, Williams' heirs would be entitled to an allotment, since they would have demonstrated that their ancestor initiated qualifying use and occupancy prior to the reservation of the land, thus excepting his claim from its effect. See United States v. Akootchook, 130 IBLA 5, 7, 11 (1994); United States v. Akootchook, 123 IBLA at 10-11. However, in the latter instance, they would not be entitled to an allotment, since they would have failed to demonstrate prior qualifying use and occupancy, thereby not excepting Williams' claim from the effect of the reservation. Id.

It is not disputed that the land in question was used and occupied by Williams' father starting in 1870 and continuing thereafter. (Handwritten notes attached to application at 5.) He built a cabin in 1880 and went there at various times: "[He] did not live there year round but went there seasonally. In the early spring [and] summer[,] he fished; in the fall[,] he hunted; and in the winter, he trapped." Id. at 4, 5. In addition, during this same time period, the land was used and occupied by Williams' entire family, which consisted of Williams, his parents, and his seven

brothers and sisters. (Handwritten notes attached to application at 1, 2 ("raised there"); SEACAP questionnaire, dated Feb. 20, 1975, at 5-6, 7-8; statement of witness (Emma K. Williams), dated Feb. 27, 1975, at 2; Land Report at 2; map attached to Field Report; aerial photograph attached to Affidavit of Williams, dated June 14, 1974; Jane Hanchett, Frank Williams--born to be a fisherman, Southeastern Log, March 1977 (newspaper article).)

Also, there is evidence that all of the activity associated with occupancy at the cabin was directed to supporting the family, with the family sharing in all of the fish and game captured by any family member, including Williams. Indeed, the March 1977 newspaper article, which was offered to the BLM examiner as evidence of Williams' independent use, reports that he had said that he "went to the Metlakatla school [on Annette Island] through about fifth grade [when he would have been about 9 or 10], [but] then had to help his family fishing and trapping more and more." (Emphasis added.) There is no evidence that Williams ever engaged in any activity for his sole benefit.

Further, while it is true that Williams was permitted to fish as an individual, the evidence is to the effect that it was done in the company of his parents or, at least, under their supervision, since they were responsible for his welfare and that of the entire family. Indeed, the March 1977 newspaper article establishes that Williams was only able to fish alone when he was able to evade his mother's supervision ("He sneaked out of the house") or later with her implicit permission ("[S]he let me go"). There is no evidence that he engaged in any of the other subsistence activities (hunting, trapping, gardening, or berrypicking) on his own.

All of this demonstrates that Williams did not engage in independent use and occupancy prior to August 20, 1902. See United States v. Jim, 134 IBLA 294, 298-99 (1995); United States v. Akootchook, 130 IBLA at 11; United States v. Alexanderoff, 129 IBLA 279, 283 (1994). Thus, the Department would be required to reject Williams' allotment application.

In such circumstances, where the record demonstrates that an application should be rejected on the basis of a factual matter that is disputed by the Native applicant, the Department is required by the court's ruling in Pence v. Kleppe, 529 F.2d 135, 142-43 (9th Cir. 1976), to set aside the BLM Decision approving the application and remand the case to BLM for initiation of a Government contest which will challenge the applicant's entitlement under the 1906 Act. City of Skagway, 136 IBLA 3, 16 (1996); National Park Service (Lewis Vanderpool), 117 IBLA 247, 251 (1991); State of Alaska (Thomas Abbott), 113 IBLA 80, 84 (1990); Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282, 285 (1982). We do so here.

The sole issue for adjudication in the contest proceeding is whether Williams initiated qualifying use and occupancy prior to the 1902 forest reservation. Williams' heirs will bear the ultimate burden of proof, by a preponderance of the evidence, with respect to this issue. See National Park Service, 117 IBLA at 250. Any party to the case who is adversely

affected by the decision of the administrative law judge will have the right to appeal to the Board. Absent appeal, the decision by the judge will be final for the Department.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside, and the case is remanded to BLM for initiation of a Government contest.

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John H. Kelly  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge